

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-4192

ORIGINAL
78-6032

BEFORE THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 78-6032

CENTRAL HUDSON GAS & ELECTRIC CORPORATION, et al.,

Appellants,

-against-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Appellees.

On Appeal from the Southern District of New York

Docket No. 77-4192

CENTRAL HUDSON GAS & ELECTRIC CORPORATION, et al.,

Petitioners,

-against-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

Petition for Review of Action of EPA

BRIEF OF APPELLANTS-PETITIONERS,
CENTRAL HUDSON, et al.

LeBOEUF, LAMB, LEIBY & MacRAE
Attorneys for Appellants-Petitioners
Office and P.O. Address
140 Broadway
New York, New York 10005
(212) 269-1100

Of Counsel:

G. S. Peter Bergen
Robert J. Glasser
Thomas E. Mark

Dated: New York, New York
March 28, 1978

LEBOEUF, LAMB, LEIBY & MACRAE

140 BROADWAY

NEW YORK, N.Y. 10005

TELEPHONE 212-269-1100

LEON A. ALLEN, JR.
JOSEPH E. BACHELDER, III
ERNEST S. BALLARD, JR.
G. S. PETER BERGEN
GEOFFREY D. C. BEST
DAVID P. B'CKS
TAYLOR R. BRIGGS
CHARLES N. BURGER
THOMAS E. BURKE
ROGER D. FELDMAN *
EUGENE R. FIDELL *
JACOB FRIEDLANDER
GERARD GIORDANO
DONALD J. GREENE
JAMES A. GREER, II
JOHN L. GROSE
DOUGLAS W. HAWES
CARL D. HOBELMAN
MICHAEL IOVENKO
JAMES F. JOHNSON, 4TH
RONALD D. JONES
LEX K. LARSON *
GRANT S. LEWIS
KIMBA W. LOVEJOY

CAMERON F. MACRAE
CAMERON F. MACRAE, III
GERARD A. MAHER
SHEILA H. MARSHALL
JAMES G. MCELROY
JAMES P. McGRANERY, JR. *
PHILIP PALMER McGUIGAN
HARVEY A. NAPIER
JAMES O'MALLEY, JR.
J. MICHAEL PARISH
WILLIAM W. ROSENBLATT
JOHN A. RUDY
PAUL G. RUSSELL
PATRICK J. SCOGNAMIGLIO
HAROLD M. SEIDEL
HALCYON G. SKINNER
JOSEPH S. STRAUSS
SAMUEL M. SUDEN
EUGENE B. THOMAS, JR. *
LEONARD M. TROSTEN *
HARRY H. VOIGT *
H. RICHARD WACHTEL
GERARD P. WATSON
THOMAS A. ZIERK

CABLE ADDRESS

LEBWIN, NEW YORK

TELEX: 423416

TELECOPIER:

212 344-9513

RANDALL J. LEBOEUF, JR. 1929-1975

HORACE R. LAMB 1934-1977

ADRIAN C. LEIBY 1952-1976

1757 N STREET, N.W.

WASHINGTON, D.C. 20036

TELEPHONE 202-457-7500

CABLE ADDRESS

LEBWIN, WASHINGTON, D.C.

TELEX: 440274

*RESIDENT PARTNERS WASHINGTON OFFICE

*NOT ADMITTED TO THE NEW YORK BAR

March 28, 1978

Clerk
United States Court of Appeals
for the Second Circuit
Foley Square
New York, New York 10007

Re: Central Hudson Gas & Electric Corp., et al.
Docket Nos. 77-4192 and 78-6032

Dear Sir:

Enclosed for filing with the Court are:

1. 25 copies each of the brief of Central Hudson Gas & Electric Corp., et al., Appellants-Petitioners, in the above captioned consolidated cases.

2. 10 copies each of the Joint Appendix of Central Hudson Gas & Electric Corp., et al. in the same proceeding.

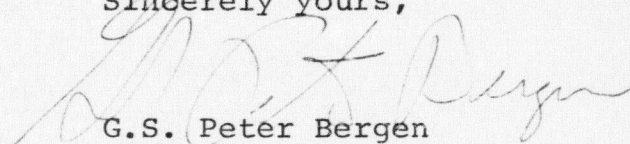
Note that the time to file this brief and Joint Appendix was extended from March 27 to March 28, 1978, by Judge Oakes' Order of March 23, 1978. That Order, which also granted our motion to consolidate these cases, was given to us by telephone on the afternoon of March 23 by Deputy Clerk Gudaro.

March 28, 1978

Page 2

This is to certify that two copies each of the brief, and one copy each of the Joint Appendix is being served, by hand, upon counsel for each party today.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "G.S. Peter Bergen", written over the typed name.

G.S. Peter Bergen

GSPB/bk
Enclosures

cc: Anne Sidamon-Eristoff, Esq. (2 briefs, 1 Joint Appendix)
Peter Devine, Esq. (4 briefs, 2 Joint Appendices)
Albert K. Butzel, Esq. (2 briefs, 1 Joint Appendix)
Paul Shemin, Esq. (2 briefs, 1 Joint Appendix)

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140 Broadway
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TABLE OF CONTENTS

	<u>Page</u>
I ISSUES PRESENTED	1
II NATURE OF THE CASE	4
A. The Appeal and the Petition for Review . . .	4
B. The Clean Water Act	5
III STATEMENT OF THE FACTS	7
A. The Power Plants	7
B. Utilities' Applications for Discharge Permits	8
1) EPA's Proposed Permits	9
2) Utilities' Requests for Adjudicatory Hearings on EPA's Proposed Permits . . .	11
C. Approval of New York State's Permit Program in October, 1975	12
D. Continued Administration by EPA of Utilities' Permit Applications.	13
E. OGC 63	14
F. The Consequences of EPA's Failure to Suspend Issuance of the Permits	15
G. Adjudicatory Hearings	17
H. Proceedings Below	19
I. The Petition for Review in the Court of Appeals	20
IV SUMMARY OF ARGUMENT	20
V ARGUMENT	22

	<u>Page</u>
POINT I - EPA'S AUTHORITY TO ISSUE UTILITIES' PERMITS TERMINATED WHEN EPA APPROVED NEW YORK'S PERMIT PROGRAM . . .	22
A. Upon Approval of a State Permit Program, EPA is Required to "Suspend" Issuance of Permits in that State	23
B. Utilities' Permits Have Not Yet Issued Because No Hearing Has Been Held	27
C. The Legislative History of the Act Shows Conclusively Congress' Intentions to Terminate EPA's Permit Issuing Activities in a State Having an Approved Permit Program and to Place Permit Issuance Fully in the Hands of the State	28
D. OGC 63's Conclusion that Permits Are "Issued" Before a Public Hearing Is Held Conflicts with the Act and the Legislative History	32
E. Conclusion	38
POINT II - THIS COURT, ON APPEAL FROM THE DIS- TRICT COURT, SHOULD DECLARE THAT EPA LACKS JURISDICTION TO CONTINUE ISSU- ANCE OF PERMITS TO UTILITIES, AND SHOULD DIRECT EPA TO SUSPEND THE ISSUANCE OF SUCH PERMITS	38
A. Section 509(b)(1) Does Not Apply to this Case	39
1. Section 509(b)(1)(F) is not Applicable Because No Permit Has Yet Been Issued . . .	40

	<u>Page</u>
2. Section 509(b)(1)(D) is not Applicable Because Utilities Do Not Challenge a "Determination as to a State Permit Program"	42
3. The Memorandum of Agreement is Irrelevant	45
B. The District Court had Jurisdiction Over the Action Filed Below, and to Grant the Relief Requested	47
1. The District Court had "Federal Question" Jurisdiction	47
2. The District Court had Authority to Issue a Judgment Declaring that EPA Does Not Now Have Jurisdiction to Continue Issuance of Permits to Utilities	49
C. Utilities Are Not Required to Exhaust Administrative Remedies Before an Agency Which Lacks Jurisdiction	51
1. Irreparable Injury	60
2. The Defect in EPA Jurisdiction is Patent	60
3. No Agency "Expertise" Is Involved	61
D. The Court of Appeals Should Now Decide the Substance of the Controversy	62
E. The Action is Timely	65

	<u>Page</u>
CONCLUSION	66
APPENDIX - RELEVANT STATUTES	
Clean Water Act (Federal Water Pollution Control Act, as amended 1972, 1977).	
§101(b); 33 U.S.C. §1251(b).	67
§301(b); 33 U.S.C. §1311(b).	68
§402(a , (b), (c), (d) and (k); 33 U.S.C. §1342(a), (b), (c), (d) and (k).	69
§509(b)(1); 33 U.S.C. §1359(b)(1).	73

TABLE OF AUTHORITIES

<u>CASES:</u>	Page
<u>Abbot Laboratories v. Gardner</u> , 387 U.S. 136 (1967). . .	55
<u>Aetna Life Insurance Co. of Hartford, Conn. v. Haworth</u> , 300 U.S. 227 (1937).	49
<u>Appalachian Power Company v. Train</u> , 545 F.2d 1351 (1976).	10
<u>Bannercraft Clothing Co. v. Renegotiation Board</u> , 466 F.2d 345 (D.C. Cir. 1972)	52
<u>Bethlehem Steel Corp. v. EPA</u> , 538 F.2d 513 (2d. Cir. 1976)	44,45
<u>Bethlehem Steel Corp. v. Train</u> , 544 F.2d 657 (3d Cir. 1976), <u>cert. denied</u> , 430 U.S. 975 (1977) . . .	18,50
<u>Board of Directors & Officers, Forbes Federal Credit Union v. National Credit Union Administration</u> , 477 F.2d 777 (10th Cir. 1973), <u>cert. denied</u> , 414 U.S. 924 (1973)	45
<u>Califano v. Sanders</u> , 430 U.S. 99 (1977)	47
<u>Coca Cola Company v. F.T.C.</u> , 475 F.2d 299 (7th Cir. 1973)	58,59
<u>Comprehensive Group Health Services Board of Directors v. Temple University</u> , 363 F. Supp. 1069 (E.D.Pa. 1973)	54
<u>Dobbs v. Costle</u> , 559 F.2d 946 (5th Cir. 1977)	33,35
<u>E.I. duPont de Nemours and Co. v. Train</u> , 541 F.2d 1018 (4th Cir. 1976)	31
<u>EPA v. California</u> , 426 U.S. 200 (1976).	24
<u>Hagedorn v. Union Carbide Corp.</u> , 363 F. Supp. 1061 (N.D.W.Va. 1973)	37
<u>Holtzman v. Schlesinger</u> , 484 F.2d 1307 (2d Cir. 1973), <u>cert. denied</u> , 416 U.S. 936 (1974).	34

<u>CASES:</u>	Page
<u>Jewel Companies, Inc. v. F.T.C.</u> , 432 F.2d 1155 (7th Cir. 1970)	54
<u>League to Save Lake Tahoe, Inc. v. Trounday</u> , 427 F. Supp. 1350 (D. Nev. 1977)	37
<u>Lee County School District No. 1 v. Gardner</u> , 263 F. Supp. 26 (D.S.C. 1967)	56
<u>Leedom v. Kyne</u> , 358 U.S. 184 (1958)	56,57
<u>Marathon Oil Co. v. EPA</u> , 564 F.2d 1253 (9th Cir. 1977)	27
<u>Marsano v. Laird</u> , 412 F.2d 65 (2d Cir 1969)	36
<u>Maryland Casualty Co. v. Pacific Coal and Oil Co.</u> , 312 U.S. 270 (1941)	49
<u>McKart v. United States</u> , 395 U.S. 185 (1969)	61
<u>Mianus River Preservation Comm. v. Administrator, EPA</u> , 541 F.2d 899 (2d Cir. 1976)	26,38,43
<u>Mooney Aircraft, Inc. v. Donnelly</u> , 402 F.2d 400 (5th Cir. 1968)	65
<u>National Automatic Laundry and Cleaning Council v. Schultz</u> , 443 F.2d 689 (D.C. Cir. 1971)	55
<u>National Life and Accident Ins. Co. v. United States</u> , 524 F.2d 559 (6th Cir. 1975)	36
<u>National Resources Defense Council v. Costle</u> , 10 E.R.C. 2025 (D.C. Cir., November 16, 1977)	35,46
<u>Natural Resources Defense Council, Inc. v. Callaway</u> , 524 F.2d 79 (2d Cir. 1975)	48
<u>Parish v. Davidson</u> , 405 U.S. 34 (1972)	52
<u>Pepsico v. F.T.C.</u> , 472 F.2d 179 (2d Cir. 1972)	39,57,58
<u>Public Service Comm'n. v. Wycoff Co.</u> , 344 U.S. 237 (1952)	49

CASES:

Page

<u>Public Service Company of New Hampshire</u> (<u>Seabrook Station, Units 1 and 2</u>), 10 E.R.C. 1257 (Case No. 76-7) (EPA June 17, 1977), <u>remanded</u> , <u>Seacoast Anti-</u> <u>Pollution League v. Costle</u> , ____ F.2d ____, Docket No. 77-1284 (1st Cir., February 15, 1978).	17
<u>Ross v. Community Services, Inc.</u> , 396 F. Supp. 278, <u>order entered</u> , 405 F. Supp. 831 (D. Md. 1975), <u>aff'd.</u> , 544 F.2d 514 (4th Cir. 1976)	35
<u>Save the Bay, Inc. v. Administrator, EPA</u> , 556 F.2d 1282 (5th Cir. 1977)	26,40
<u>Seacoast Anti-Pollution League v. Costle</u> , ____ F.2d ____, Docket No. 77-1284 (1st Cir., February 15, 1978).	27
<u>Shell Oil Co. v. Federal Energy Administration</u> , 400 F. Supp 964 (S.D. Texas 1975), <u>aff'd.</u> , 527 F.2d. 1243 (Em. App. 1975).	53,54
<u>Skinner & Eddy Corp. v. United States</u> , 249 U.S. 557 (1919)	57
<u>Slough v. Commissioner of Internal Revenue</u> , 147 F.2d 836 (6th Cir. 1945).	35
<u>Smith v. Government of Virgin Islands</u> , 329 F.2d 135 (3d Cir. 1964), <u>reh. denied</u> , 379 U.S. 872 (1964)	62,63
<u>State of Washington, et. al. v. EPA</u> , ____ F.2d ____ Docket Nos. 75-2479, 2494 and 76-1305, (9th Cir. March 6, 1978).	26,42,55, 62,64
<u>State of California ex rel. Christensen v.</u> <u>F.T.C.</u> , 549 F.2d 1321 (9th Cir. 1977)	60,61
<u>State Water Control Board v. Train</u> , 559 F.2d 921 (4th Cir. 1977).	18,34,50
<u>Sterling Drug v. Weinberger</u> , 509 F.2d 1236 (2d Cir. 1975).	58
<u>Stone v. E.D.S. Federal Corporation</u> , 351 F. Supp. 340 (N.D. Calif. 1972).	65

CASES:

Page

<u>Sun Enterprises, Ltd. v. Train</u> , 532 F.2d 280 (2d Cir. 1976).	40
<u>Tri-State Generation & Transmission Association, Inc. v. Public Service Commission of Wyoming</u> , 412 F.2d 115 (10th Cir. 1969), <u>cert. denied</u> , 397 U.S. 1043 (1970).	63
<u>U.S. Steel v. Train</u> , 556 F.2d 822 (7th Cir. 1977) . .	18,27,50
<u>Universal Athletic Sales Co. v. Salkeld</u> , 511 F.2d 904 (3d Cir. 1975), <u>cert. denied</u> , 423 U.S. 863 (1975).	64
<u>Utah Power & Light Co. v. EPA</u> , 553 F.2d 215 (D.C. Cir. 1977).	41
<u>Walling v. Baltimore Steam Packet Co.</u> , 144 F.2d 130 (4th Cir. 1944).	35,45
<u>William B. Tanner Co., Inc. v. WIOO, Inc.</u> , 528 F.2d 262 (3d Cir. 1975)	64
<u>Writers Guild of America, West, Inc. v. F.C.C.</u> , 423 F. Supp. 1064 (N.D. Calif. 1976).	53,59,60

STATUTES:

Administrative Procedure Act 5 U.S.C. §704	55
Clean Air Act §307 <u>et seq.</u> (42 U.S.C. §1857 <u>et seq.</u>)	37
§307(b)(1) (42 U.S.C. §1857(b)(1))	44
Clean Water Act (Federal Water Pollution Control Act, as amended 1972, 33 U.S.C. §§1251 <u>et seq.</u> , as amended by the Clean Water Act of 1977, P.L. 95-217, 91 Stat. 1566 (1977)).	5
P.L. 95-217, §26(b), 91 Stat. 1575.	23
§101 <u>et seq.</u> (33 U.S.C. §1251 <u>et seq.</u>)	4
§101(b) (33 U.S.C. §1251(b)).	6,23

CASES:

Page

§301 (33 U.S.C. §1311).	5,10
§301(b)(1) (33 U.S.C. §1311(b)(1)).	50
§301(b)(2) (33 U.S.C. §1311(b)(2)).	18,50
§304 (33 U.S.C. §1314)	10
§306 (33 U.S.C. §1316).	7
§309 (33 U.S.C. §1319).	18
§402 (33 U.S.C. §1342).	5
§402(a) (33 U.S.C. §1342(a)).	6,10,15, 23,29,32
§402(a)(1) (33 U.S.C. §1342(a)(1)).	27,28,33
§402(a)(3) (33 U.S.C. §1342(a)(3)).	24
§402(a)(5) (33 U.S.C. §1342(a)(5)).	8
§402(b) (33 U.S.C. §1342(b)).	6,42,43
§402(c) (33 U.S.C. §1342(c)).	15,24,27 30,45
§402(c)(1) (33 U.S.C. §1342(c)(1)).	<u>passim</u>
§402(d) (33 U.S.C. §1342(d)).	24
§402(d)(4) (33 U.S.C. §1342(d)(4)).	24
§402(k) (33 U.S.C. §1342(k)).	34
§502(6) (33 U.S.C. §1362(6)).	6
§505 (33 U.S.C. §1365).	48
§505(e) (33 U.S.C. §1365(e)).	48
§509(b) (33 U.S.C. §1369(b)).	62
§509(b)(1) (33 U.S.C. §1369(b)(1)).	4,20,27 28,39,40 44,48,64
§509(b)(1)(D) (33 U.S.C. §1369(b)(1)(D)).	21,42,64
§509(b)(1)(F) (33 U.S.C. §1369(b)(1)(F)).	21,39,40 41,64

CASES:

Page

Declaratory Judgment Act

28 U.S.C. §2201.	49
28 U.S.C. §2202.	49

Judicial Code

28 U.S.C. §1291.	4,62
28 U.S.C. §1331.	21,47

RULES AND REGULATIONS:

40 C.F.R.

Part 124	6
125.35	32
125.36(b)(1)	32
125.36(l)(1)	16
125.36(m)	13,16,55
125.36(m)(4)	16
125.36(n).	55
125.36(n)(6)	27
39 Fed. Reg. 27079 (July 24,1974).	9
40 Fed. Reg. 54462 (Nov. 24, 1975)	12,22
Fed. R. Civ. P. Rule 12(h)(3).	66

MISCELLANEOUS:

Druley, "The Refuse Act of 1899," BNA Environment Reporter Monograph No. 11 (1972).	8
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CASES:

Page

Env. Policy Div., Cong. Research Svc., Library of Congress, 93d Congress, 1st Sess. <u>A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Congress, 1st Session (Serial No. 93-1)</u> (January, 1973).	28,29,31
1 Grad, <u>Treatise on Environmental Law,</u> <u>§3.03(1)(b)(1977).</u>	8
10 C. Wright & A. Miller, <u>Federal Practice and Procedure, Civil §2757 (1973).</u>	49
2A Moore, <u>Federal Practice ¶12.23.</u>	66

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BRIEF OF APPELLANTS-PETITIONERS,
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I

ISSUES PRESENTED

1. Whether, after October 1975 (when EPA found New York State qualified pursuant to §402(b) of the Clean Water Act to administer a permit program in New York State), EPA lost jurisdiction to issue the permits to Utilities where §402(c) of the Clean Water Act provides that upon approval of a State permit program, EPA "shall suspend the issuance of permits under subsection (a) [of §402]".

[The District Court did not decide this question.
Utilities urge that the answer is "yes".]

2. Whether a permit can be "issued" within the meaning of §§402(a) and 402(c) before completion of public hearings on contested permit conditions where §402(a) provides that "the Administrator may, after opportunity for public hearing, issue a permit."

[The District Court did not decide this question. Utilities urge that the answer is "no".]

3. Whether a District Court has subject matter jurisdiction under 28 U.S.C. §1331 and related sections to enjoin EPA from continuing the process of issuance of a permit where plaintiffs allege that EPA has previously transferred its permit issuing authority to a state agency pursuant to §402(b) of the Act and allege that EPA, therefore, no longer has jurisdiction to proceed.

[The District Court held that it does not have subject matter jurisdiction. Utilities submit that the District Court had such jurisdiction.]

4. Whether a petition for review filed in the Court of Appeals under §509(b)(1) of the Act is an appropriate means for a permit applicant to seek injunctive and declaratory relief against EPA where the permit applicant asserts that EPA has not yet issued an NPDES Permit, and asserts that EPA is continuing the process of permit issuance without any jurisdiction to do so.

[The District Court held that the Court of Appeals has subject matter jurisdiction. Utilities filed a petition for review in this Court under 509(b)(1) as a protective measure.]

II

NATURE OF THE CASE

This is both an appeal from a final judgment of the District Court, Southern District of New York, Carter, J., pursuant to 28 U.S.C. §1291 (Case No. 78-6032) and a petition for review under §509(b)(1) (Case No. 77-4192) of the Clean Water Act (the "Act").* The appeal and petition for review are consolidated by the Court's order of March 23, 1978.

A. The Appeal and the Petition for Review

Judge Carter's opinion below, reproduced in the joint appendix at JA 595,** was filed February 10, 1978; the notice of appeal was filed on February 17, 1978 and an amended notice of appeal was filed on March 3, 1978.

The petition for review was initially filed in this Court on November 7, 1977 (JA 276), less than 90 days after service on the Utilities*** of an EPA General Counsel's

* The Clean Water Act is the name given by P.L. 95-217 to the Federal Water Pollution Control Act of 1972 (P.L. 92-500) which was amended December 27, 1977 by P.L. 95-217. The Federal Water Pollution Control Act is codified at 33 U.S.C. §1251 et seq. The amended version of the Act is found in Serial No. 95-12, published by the Sen. Comm. on Env. and Pub. Works (December 1977). In this brief, citations to the Act are to the public law text and section numbers; the Table of Authorities to the brief supplies cross references to the U.S.C. compilation.

** The designation "JA ____" refers to the pages of the joint appendix to the briefs herein.

*** The Appellants-Petitioners are referred to herein as the "Utilities".

Opinion ("OGC 63") on August 11, 1977 (JA 35). OGC 63 holds that EPA, not the New York Department of Environmental Conservation ("NYDEC"), has jurisdiction to issue the permits in question to Utilities. Pursuant to a stipulation entered into November 18, 1977 between counsel for EPA and Utilities, during a pre-hearing conference in this Court, the initial petition for review in Case No. 77-4192 was withdrawn without prejudice to the filing of a supplemental petition for review in this docket, within 30 days after a final order in the District Court case now on appeal. Such stipulation provided, and this Court so ordered, that any such supplemental petition for review shall be deemed to be filed as of November 7, 1977, for all purposes including for purposes of §509(b)(1) of the Act. The supplemental petition for review was filed February 21, 1978 (JA 622).

B. The Clean Water Act

In the Federal Water Pollution Control Act, as amended in 1972,* Congress provided that "the discharge of any pollutant by any person shall be unlawful", except as provided in §301 (33 U.S.C. §1311) and §402 (33 U.S.C. §1342) of the

* The Act was further amended by PL 95-217 on Dec. 27, 1977, after the briefs were filed in the District Court. Other than modifying the date to achieve "Best Available Technology" (See *infra*, p. 18), the 1977 amendments do not alter the applicable law (See Bergen Affidavit (JA 589)).

Act. The term "pollutant" is defined to include "heat".
§502(6).

Section 402(a) of the Act provides that the Administrator of EPA may, after opportunity for public hearing, issue a permit (called an "NPDES" permit) for the discharge of a pollutant. The permit program in §402 further provides, in subsection (b), that states may administer their own permit programs and issue discharge permits. A state must apply under §402(b) to administer the NPDES permit program, and, in order to qualify to administer such program, must fulfill the requirements specified in §402(b) of the Act and in applicable EPA regulations (40 C.F.R. Part 124).

Congress expressed in §101(b) of the Act the policy that states have the "primary responsibilities and rights" in the field of pollution control, and that "the States...implement the permit programs under...[§]402...of this Act."

Section 402(c)(1) of the Act provides that "[n]ot later than ninety days" after a state has submitted an approvable program to EPA, the EPA Administrator "shall suspend the issuance of permits under subsection (a)" of §402 of the Act. Thereupon, the authority and jurisdiction within that state to continue the issuance of permits under the Act and to administer the permit program passes to the state.

III

STATEMENT OF THE FACTS

Appellants-Petitioners are three electric utilities and the Power Authority of the State of New York. Federal Appellees-Respondents are the Environmental Protection Agency ("EPA") and employees of EPA (See JA 17-18). State Appellees are the New York Department of Environmental Conservation ("NYDEC") and its Commissioner. Intervenor Hudson River Fishermen's Association ("HRFA") is a fishing club, which was allowed to intervene in the District Court case and in No. 77-4192 over Utilities' objection (JA 286, 302).

A. The Power Plants

Utilities operate various electric generating stations. These include Central Hudson's Roseton generating station, Orange and Rockland's Bowline generating station, Con Edison's Indian Point Unit 2, and the Power Authority's Indian Point Unit 3. Block Affidavit, ¶¶13-16 (JA 75). Each of these plants commenced operation after January 1, 1970.*

Each of the power plants generates electricity by the use of steam, which requires that heat be removed by a

* These plants are not "new sources" within the meaning of §306 of the Act, because construction of each commenced before March 4, 1974 when EPA first published proposed "effluent limitation guidelines" under the Act for steam-electric power plants.

cooling system. Block Affidavit, ¶17 (JA 75). Each of the plants now employs what is known as a once-through cooling system. That is, pumps located near the bank of the Hudson River withdraw water from the river, circulate the water through condensers in the power plant where heat is transferred to the cooling water, and then return the cooling water to the river at a slightly increased temperature. Block Affidavit, ¶17 (JA 75).

B. Utilities' Applications For Discharge Permits

Because heat is defined to be a "pollutant," operation of these power plants requires a permit. Initial applications for discharge permits were made prior to 1972 for Indian Point Unit 2 and the Bowline and Roseton generating stations pursuant to a permit program then in effect under the Refuse Act of 1899.* On the effective date of the Act (October 18, 1972), those applications became applications to EPA for NPDES permits pursuant to §402(a)(5) of the Act. The NPDES permit application for Indian Point Unit 3 was filed with EPA on July 9, 1974. Block Affidavit, ¶18 (JA 76).

* See generally, 1 Grad, Treatise on Environmental Law, §3.03(1)(b), (1977), and Druley, "The Refuse Act of 1899", BNA Environment Reporter Monograph No. 11 (1972).

(1) EPA's Proposed Permits

Presumably, EPA began processing these applications as soon as they were received. However, not until February 1975, did the EPA Region II Administrator circulate Public Notices of "Issuance of Final Determination" with respect to Bowline Point, Roseton, and Indian Point Unit 2. A similar Public Notice was published on July 3, 1975, regarding Indian Point Unit 3. Block Affidavit, ¶20 (JA 77).^{*} Each of the Public Notices stated that EPA proposed to issue NPDES permits unless adjudicatory hearings were granted. The Public Notices did not claim to have issued permits. Each of these Public Notices provided in relevant part:

"Notice is hereby given that Region II of the United States Environmental Protection Agency (EPA) proposes to issue a final national pollutant discharge elimination system (NPDES) permit...to discharge pollutants into the waters of the United States.

* * *

"The Final Determination will become a final NPDES permit, issued and effective on March 31, 1975 [on July 31, 1975 in the case of Indian Point Unit 3] unless an Adjudicatory Hearing is granted pursuant to 40 CFR §125.36 as published at 39 Fed. Reg. pp.

* In May 1974 (not May 1975 as stated in the Opinion Below (JA 598)), EPA circulated "draft" NPDES permits to Utilities under the EPA regulations then in effect. (JA 332). However, EPA, in July 1974 (39 Fed. Reg. 27079 (JA 332)), changed its rules, and the May 1974 "drafts" were superseded by the February 1975 notices.

27081-27084 (July 24, 1974)..." (Emphasis added)
(JA 88-90) (Indian Point "Notice of Issuance").

Each Public Notice was mailed to the permit applicant along with the "Final Determination" referred to in the notice in the form of a document entitled "National Pollutant Discharge Elimination System Permit, Discharge Permit".*

Each of the proposed NPDES permits would require the reduction by more than 90% of the amount of heat discharged through the existing once-through cooling systems at each of the facilities.** Block Affidavit, ¶¶22-23 (JA 78).

* These documents, which the public notice states merely constitute EPA Region II's "proposals", are referred to herein for convenience as the "proposed permits" for the power plants. Block Affidavit, ¶21 (JA 77; Scolnik Aff. (JA 333)).

** These reductions were based upon the EPA effluent limitation guideline regulations issued pursuant to §§301 and 304 of the Act, and applicable to thermal discharges from units greater than 500 megawatts capacity which commenced operation after January 1, 1970, such as the Bowline, Roseton and Indian Point units involved in this action. These regulations were set aside and remanded in Appalachian Power Company, et al. v. Train, 545 F.2d 1351 (4th Cir. 1976). In the absence of guidelines governing thermal discharges, EPA is proceeding under §402(a) of the Act which provides that the EPA Administrator may, after opportunity for hearing, issue a permit upon such conditions as the Administrator determines are necessary to carry out the provisions of the Act.

This level of reduction could only be attained by replacing the existing once-through cooling systems with enormously costly closed-cycle cooling systems. To decommission the existing once-through cooling systems and install closed-cycle cooling systems at each of these six units would involve a capital cost in excess of \$358 million, and annual costs in excess of \$100 million each year.*

(2) Utilities' Requests For Adjudicatory Hearings on EPA's Proposed Permits

Each Utility requested an adjudicatory hearing, and these requests were granted by EPA Region II between May and September 1975; Public Notices of the adjudicatory hearings were issued by EPA.** According to the terms of the "Notices of Issuance of Final Determination", the grant of adjudicatory hearings on these contested permit conditions had the effect of

* Compliance with EPA's proposed permits would require two cooling towers at the Bowline plant, two cooling towers at the Roseton plant, one cooling tower at Indian Point Unit 2, and one cooling tower at Indian Point Unit 3. See Block Affidavit Exhibit E (JA 195). Operation of the cooling towers would consume the energy equivalent of about 720,000 barrels of oil each year. They would each be between 390 and 560 feet in height, arising from the banks of the Hudson River like six 40 to 45 story skyscrapers, and would emit steam vapor which would at times be visible for miles. Block Affidavit, ¶24 (JA 78).

** These Public Notices are annexed to the Block Affidavit as Exhibits F, G, H, and I (JA 199-248).

not issuing those conditions of the proposed permits. Block Affidavit, ¶¶25-27 (JA 79-80).

C. Approval of New York State's Permit Program
in October, 1975

Meanwhile, in 1974 the State of New York had submitted a proposed permit program to EPA Region II. Thus, while EPA Region II was still in the preliminary stages of the issuance of Utilities' permits, it knew that transfer of jurisdiction to continue administrative actions related to Utilities' permits to NYDEC was imminent. Block Affidavit, ¶28 (JA 80).

Effective October 29, 1975, EPA approved the New York permit program, to be administered by NYDEC for all navigable waters within the State of New York. 40 Fed. Reg. 54462 (Nov. 24, 1975) (set forth in full in Exhibit J to the Block Affidavit (JA 249)).* Therefore, Utilities believe that, by

* The EPA Federal Register Notice indicates that the New York State permit program is being administered in accordance with state statutes and regulations and two Memoranda of Agreement between EPA and state administrative bodies. The state statutes are sources of state agency jurisdiction. The state regulations implement that jurisdiction. The two Memoranda of Agreement, however, relate to ministerial matters such as exchange of information and are not sources of agency jurisdiction, since jurisdiction cannot be conferred by agreement. The state statutes and regulations are relevant to EPA's determination that the State's authority is adequate for New York to administer its own permit program under the Act and are not in issue in this case. The two Memoranda are irrelevant to any jurisdictional aspects of the permit program. (See infra, pp. 45 to 47.)

operation of §402(c)(1), EPA was then required to "suspend the issuance" of permits within New York State and that EPA was then divested of authority to continue the issuance of NPDES permits for Utilities' plants.

D. Continued Administration by EPA of
Utilities' Applications

However, after the New York State permit program became effective, EPA Region II continued processing Utilities' permit applications. EPA Region II Staff continued after October 1975 to request information from Utilities and to prepare for adjudicatory hearings; and, in August 1976, EPA Region II requested that EPA Headquarters in Washington assign an Administrative Law Judge ("EPA ALJ") for such hearings. Block Affidavit, ¶29 (JA 81).

An EPA ALJ was assigned in late 1976 and held the initial prehearing conference in February 1977. The individual permit proceedings were consolidated for hearing purposes. Block Affidavit, ¶29 (JA 81).

Also at that conference, as provided by EPA regulations,* Utilities objected to the failure of EPA to suspend its issuance of permits on the grounds that jurisdiction to continue issuing permits to Utilities had been transferred on

* 40 C.F.R. §125.36(m).

October 29, 1975 to New York State by operation of §402(c)(1) of the Act and that continuation of proceedings before EPA would cause further delays in providing Utilities with a hearing, in the proper forum, on their opposition to EPA's proposed cooling towers. Block Affidavit, ¶30 (JA 81).

After the prehearing conference, on March 14, 1977 the EPA ALJ referred to the EPA General Counsel the legal issues Utilities had raised with regard to EPA's lack of jurisdiction to continue issuing these permits (along with three other legal issues raised by Utilities). The questions were briefed by the parties, and the EPA General Counsel's decision, entitled "Decision of the General Counsel on Matters of Law Pursuant to 40 C.F.R. §125.36(m), No. 63 (July 29, 1977)" ("OGC 63"), was served upon Utilities on August 11, 1977 (JA 34).

E. OGC 63

In OGC 63, the EPA General Counsel considered:

"Whether jurisdiction to issue the contested permit conditions in these cases has been transferred by the Environmental Protection Agency (EPA, Agency) to the New York Department of Environmental Conservation (NYDEC) by virtue of the transfer of permit issuing authority to NYDEC in October, 1975, pursuant to Section 402(b) of the [Act]?" OGC 63 at 1-2 (JA 35-36).

In briefs submitted to the EPA General Counsel, Utilities' position was (and is) that §402(c)(1), which

requires EPA to "suspend the issuance of permits under subsection (a) of [§402]", terminated EPA's authority to continue the process of issuing the permits to Utilities as of October 29, 1975, so that further hearings before EPA are null and void. However, the EPA General Counsel interpreted §402(c) to be inapplicable to permits which EPA was still in the process of administering at the time a state permit program became effective. OGC 63 further held that permits are "issued" for purposes of §402(c) at the time the EPA Regional Administrator makes his initial "determination pursuant to 40 C.F.R. §125.35." OGC 63 at 7 (JA 41). In the case of Utilities' permits, these "determinations" were made in February-May, 1975, prior to the date the New York permit program was approved. Utilities contended, however, that the "determinations" did not constitute "issuance" of the permits, because by the terms of §402(a), EPA may only issue a permit "after opportunity for public hearing", and Utilities had not yet been afforded their statutory opportunity for public hearing with respect to the permits.

F. The Consequences of EPA's Failure to Suspend Issuance of The Permits

EPA regulations provide that an EPA General Counsel's Decision is

"final with respect to each referred issue of law as it relates to the particular permit[s] in question and shall be relied upon by the Regional Administrator in rendering the initial decision." 40 C.F.R. §125.36(m)(4) (1976).

The Initial Decision by the Regional Administrator cannot be made until the close of hearings and briefing. 40 C.F.R. §125.36(1)(1)(1976). Under EPA's regulations, OGC 63 cannot be appealed to the EPA Administrator until after the initial decision by the Regional Administrator. 40 C.F.R. §125.36(n) (1976).

EPA proceedings will require considerable time--time to hear and brief, time for the Region II Administrator to make his Initial Decision, and time for review of the Initial Decision by the EPA Administrator. EPA Region II has already squandered a large portion of the time available. In the case of Indian Point 2, Bowline and Roseton, it took EPA Region II from October 18, 1972 (the effective date of the Act) until the end of February, 1975 (about 27 months) simply to review Utilities' permit applications and develop EPA Region II's proposed NPDES permit. Requests for adjudicatory hearings were granted in May-August, 1975, but it wasn't until a year later (August, 1976) that EPA Region II even requested that an Administrative Law Judge be assigned for the hearings. The first prehearing conference was not held until February 1977--two years after

the proposed permits were circulated. Block Affidavit, ¶34 (JA 82).

G. Adjudicatory Hearings

Pursuant to the schedule adopted at the February conference, Utilities filed their direct case on July 11, 1977. After being served with Utilities' case in chief on July 11, 1977, EPA Region II filed a Motion with the EPA ALJ to delay the hearings for more than five months. The Motion for delay was granted, and hearings did not begin until December 6, 1977. Block Affidavit, ¶¶35-36 (JA 82). The current hearing schedule will assure that hearings cannot be completed until March 1979, at the earliest; the case would not be ripe for Initial Decision until the summer or fall of 1979. The time required for the Regional Administrator to prepare an Initial Decision on a complicated technical record cannot be predicted, but it is not unusual for EPA to consume more than a year in this effort in smaller or less complex cases.*

Utilities are forced into a serious dilemma by these circumstances. Block Affidavit ¶¶41-46 (JA 84-86). The Act

* See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), 10 E.R.C. 1257 (Case No. 76-7) (EPA June 17, 1977), remanded, Seacoast Anti-Pollution League v. Costle, ___ F.2d ___ Docket No. 77-1284 (1st Cir., Feb. 15, 1978).

requires that any anti-pollution facilities which might ultimately be required must be installed no later than July 1, 1984.* However, there would not be sufficient time after mid-1981 to conduct hearings before NYDEC to allow judicial review and related proceedings, and also to install any required facilities by July 1, 1984. Utilities will be subject to the severe sanctions under the Act for failure to achieve the 1984 deadline which is statutory and inflexible.** Such sanctions could include shutdown of these essential electric generating plants, criminal penalties, and substantial civil fines and penalties. (See §309.)

Accordingly, Utilities submit that they are irreparably injured by EPA's continuing to act without jurisdiction. (JA 86.) The lack of EPA jurisdiction infects the EPA proceeding as a latent jurisdictional defect, and the eventual

* Prior to amendment on December 27, 1977, §301(b)(2) of the Act required that "best available technology economically achievable" must be installed no later than July 1, 1983. Following amendment the Act now appears to require that best technology economically achievable be installed no later than July 1, 1984, provided that appropriate guidelines applicable to steam-electric point sources are promulgated not later than July 1, 1981. See Bergen Affidavit, JA 589.

** See Bethlehem Steel Corp. v. Train, 544 F.2d 657 (3d Cir. 1976), cert. denied, 430 U.S. 975 (1977); U.S. Steel v. Train, 556 F.2d 822 (7th Cir. 1977); State Water Control Board v. Train, 559 F.2d 921 (4th Cir. 1977).

EPA decision will, no doubt, be challenged on jurisdictional grounds, regardless of which party prevails. In that event, if Utilities are correct, the entire hearing process would have to be done all over again before NYDEC, and it is extremely unlikely that NYDEC hearings could be completed and any required facilities built by July 1, 1984.

Utilities are seeking in this case a decision only on the very narrow legal question: which body--EPA or NYDEC--has jurisdiction to issue the permits to Utilities. Utilities only ask the Court to declare that, under the Act, EPA's authority to determine the merits of the cooling tower question has been terminated by §402(c)(1) and has been transferred to NYDEC.

H. Proceedings Below

By complaint filed October 5, 1977, Utilities requested that EPA be enjoined from continuing to issue NPDES permits to Utilities, and that the Court declare that NYDEC was the appropriate agency before which to proceed. On November 1, 1977, Utilities moved for summary judgment. (JA 69.) Over Utilities' objection, the District Court granted Hudson River Fishermen's Association's motion to intervene in the District Court proceedings. By motions filed November 30, 1977, defendants and intervenor moved to dismiss the complaint and, in the alternative, cross-moved for summary judgment.

The District Court held that the Court of Appeals has exclusive jurisdiction over the subject matter under §509(b)(1) and dismissed the complaint without reaching the merits.

I. The Petition for Review in the Court of Appeals

September 7, 1977, less than 90 days after August 11, 1977, when EPA served OGC 63 upon them, Utilities filed their initial petition for review in this Court. That petition was filed as a protective measure in the event that EPA asserted that the complaint in the District Court should be dismissed on the theory that subject matter jurisdiction lies in this Court under §509(b)(1). By stipulation of counsel on November 18, 1977 (JA 624), Utilities and EPA agreed to suspend proceedings in this Court pending the outcome of the District Court case, and this Court "so ordered".

IV

SUMMARY OF ARGUMENT

The Act requires that an adjudicatory hearing be completed before permits can issue. Since hearings have just begun, no permit can yet have issued. The Act also provides that EPA must "suspend the issuance" of permits upon approving a state's permit program. EPA approved New York's program in October, 1975. Therefore, according to the plain language of the Clean Water Act, and its legislative history, EPA no longer has jurisdiction to issue the NPDES permits Utilities seek,

and EPA must, therefore, suspend issuance. New York State, not EPA, has the authority to issue the permits.

The District Court ruled incorrectly that the Court of Appeals has exclusive subject matter jurisdiction over this controversy. Court of Appeals jurisdiction is invoked only in six narrowly defined situations, none of which apply to the relief sought by Utilities in the District Court. Since no permits have yet been issued, §509(b)(1)(F), which applies to challenges to permits issued or denied by EPA, cannot apply. Similarly, Utilities do not challenge EPA's approval of New York's permit program, and therefore, §509(b)(1)(D), which governs challenges to such approvals, cannot apply. Rather, the District Court had "federal question" jurisdiction under 28 U.S.C. §1331, and should have decided the action on the merits.

Due to the irreparable harm being suffered by Utilities, this Court should now reach and decide the merits of the controversy. The Clean Water Act requires Utilities to be in full compliance with the Act by July 1, 1984. Construction of the facilities to achieve compliance may require more than 5 years, and completion of EPA proceedings could well consume two more years before construction could begin. Therefore, hearings must be completed promptly before the agency having jurisdiction to issue the permits. Since that Agency is NYDEC,

not EPA, the permit proceeding must be transferred now if Utilities are to be able to comply with the Act. No purpose can be served by delaying a decision on the merits of this controversy until the EPA proceedings have been completed, because no agency expertise is involved and the question presented is purely legal. Therefore, this Court, in the exercise of its appellate jurisdiction, should now order EPA to halt these permit proceedings and declare that jurisdiction has been transferred to NYDEC.

V

ARGUMENT

POINT I

EPA'S AUTHORITY TO ISSUE UTILITIES'
PERMITS TERMINATED WHEN EPA APPROVED
NEW YORK'S PERMIT PROGRAM

Effective October 29, 1975, upon determining that New York State's permit program met the requirements of the Act, EPA approved the New York permit program for all "navigable waters" in the State. 40 Fed. Reg. 54462 (Nov. 24, 1975) (JA 250). Section 402(c)(1) of the Act directed EPA to "suspend the issuance of permits" and EPA was thereupon divested of jurisdiction to continue the process of issuing permits to Utilities. At that time, EPA had not yet issued Utilities' permits because no adjudicatory hearing had been held; and

§402(a) specifies that permits may issue only "after opportunity for public hearing," i.e., after an adjudicatory hearing has been held. Two years later, in disregard of §402(c)(1), EPA has failed and refused to "suspend the issuance" of Utilities' permits and is improperly continuing the process of issuance of Utilities' permits.

EPA's only grounds for assertion of jurisdiction over Utilities' permits are set forth in its General Counsel's Decision in OGC 63. (JA 35). But OGC 63 simply disregards the clear command of §402(c)(1), and fails to state any legitimate reason in support of its conclusion that EPA may ignore §402(c)(1) and retain jurisdiction Congress has expressly denied to EPA.

A. Upon Approval of a State Permit Program,
EPA is Required to "Suspend" Issuance
of Permits in that State

The first section of the Act says:

"It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution ..." §101(b); 33 U.S.C. §1251(b).

Moreover, this section was amended in 1977 by the addition of the further statement: "It is the policy of Congress that the States...implement the permit programs under sections 402 and 404 of this Act." P.L. 95-217, §26(b)(1977). Therefore, Congress has directed that the States, not EPA,

should have the primary responsibility for enforcing the Clean Water Act.*

The message of §402(c) is equally clear: upon approving a State permit program, EPA is to get out of the permit issuing business and retain only narrow residual authority. The elements of EPA's residual authority are expressly set forth in §§402(c) and (d) of the Act. EPA's authority does not include the right to hold hearings or issue permits, except under the narrow circumstances which are set forth in Section 402(d)(4) of the Act as recently amended and which are not applicable here. By specifying the authority retained by EPA on approval of a state permit program, and not including the power to hold hearings or continue issuing permits as an element of EPA's retained authority, Congress has denied that authority to EPA and provided for its exercise by the states.**

* This direction is embodied in §402(a)(3) of the Act, which directs EPA to establish its permit program: "subject to the same terms, conditions and requirements as apply to a State permit program...." This directive expresses Congress' intent that the States, and not EPA, are to take the lead in issuing permits. If EPA had been intended to be the primary issuer of permits, Congress would have indicated that States follow EPA's permit program as a model, rather than the reverse.

** In EPA v. California the Supreme Court noted that the purpose of the permit system was "...that the States be given maximum responsibility for the permit system and EPA's review authority be restricted as much as was consistent with its overall responsibility for assuring attainment of national goals...." EPA v. California, 426 U.S. 200, 224-5, n. 39 (1976) (Emphasis added).

Section 402(c)(1) directs that EPA "suspend the issuance of" permits after a state permit program becomes effective. Section 402(c)(1) provides:

"Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section [304(h)(2)] of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines."
(Emphasis added).

The provisions of §402(c)(1) are clear, unambiguous and mandatory. The term "shall suspend the issuance of permits" in §402(c)(1) means precisely that--once a state permit program has become effective, EPA is to stop issuing permits within the state.

There are many steps in the administrative processing of a request for a permit, from application through a final, binding permit. Section 402(c)(1) does not single out any intermediate stage as the point at which EPA's issuance of a permit is complete; and the permit is not issued until the process is over. See pp. 27-28, *infra*. Section 402(c)(1) compels EPA to "suspend"--to terminate--its administrative processes of issuing permits, without regard to where an individual permit may be in the issuing process, because, in

order to achieve the policy that States administer the permit program, Congress deliberately provided that all remaining steps must be completed by the state.

The Second Circuit described the operation of §402(c) in Mianus River Preservation Comm. v. Administrator, EPA, 541 F.2d 899 (2d Cir. 1976):

"...subsection (c) of §402 directs that the federal permit issuing program shall be suspended in such States where a valid State program continues to operate. Such a system for the mandatory approval of a conforming State program and the consequent suspension of the federal program creates a separate and independent State authority to administer the NPDES pollution controls, in keeping with the stated Congressional purpose 'to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution....' FWPCA §101(b). Congress has not created a discretionary power in the Administrator to delegate his own authority to States with sufficient programs; it has clearly directed that the States are to administer the permit system if the Administrator determines that applying States have sufficient programs." 541 F.2d at 904-905 (Emphasis added).

The Fifth Circuit reached the same conclusion* in Save the Bay, Inc. v. Administrator, EPA, 556 F.2d 1282 (5th Cir. 1977):

"Upon approval of a state program, EPA must suspend its own issuance of permits covering those navigable waters subject to the program. §402(c)(1), 33 U.S.C. §1342(c)(1). Although its role as issuer of NPDES permits thereupon ceases, the federal agency retains review authority and responsibility over an approved state program." 556 F.2d 1282, 1285 (Emphasis added).

* See also the recent Ninth Circuit decision in State of Washington v. EPA, ___ F.2d ___ Docket Nos. 75-2479, et.al., (9th Cir. March 6, 1978) (slip opinion) n. 4.

B. Utilities' Permits Have Not Yet Issued
Because No Hearing Has Been Held

In addition to specifying that EPA must transfer permit-issuing authority to the states as soon as state programs become effective, Congress also defined when a permit issues. Section 402(a)(1) of the Act provides that "the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant." (Emphasis added.) Thus, the process of "issuance" includes a hearing and, until that hearing has been held, no permit can issue.*

Moreover, it is well settled that the "public hearing" mentioned in §402(a) is not a mere legislative hearing, but an "adjudicatory hearing" of the type in which Utilities and EPA are now engaged. See U.S. Steel v. Train, 556 F.2d, 882 (7th Cir. 1977); Marathon Oil Co. v. EPA, 564 F.2d 1253, (9th Cir. 1977); and Seacoast Anti-Pollution League v. Costle, ___ F.2d ___, Docket No. 77-1284 (1st Cir., February 15, 1978). This is also made clear in an opinion of the Department of

* Also, §509(b)(1) makes clear that "[r]eview of the Administrator's action...in issuing...any permit under §402 may be had...in the Circuit Court of Appeals...upon application...[and]...[a]ny such application shall be made within 90 days from the date of such...issuance...". Presumably, "issuance" means the same thing as used in both §509 and §402(c). Under §509(b)(1), "issuance" refers to a final order of the Administrator, and there can be no review in the Circuit Court prior to issuance of such final order as EPA admits. (See 40 CFR §125.36(n)(6), and see EPA brief to the District Court (November 30, 1977) at p. 25).

Justice, which was part of the record on which OGC 63 was decided. (See Legal Opinion of Antonin Scalia, Assistant United States Attorney General (December 31, 1975) (JA 567)). Therefore, until Utilities' adjudicatory hearings have been completed, no permit can issue. When §§402(a)(1), 402(c)(1) and 509(b)(1) are read together, the meaning is clear: if a state program becomes effective before EPA has held hearings, then EPA cannot hold those hearings because it must "suspend the issuance" of permits. Rather, the State must hold the hearings and complete the process of issuing the permits.

- C. The Legislative History of the Act Shows Conclusively Congress' Intention to Terminate EPA's Permit Issuing Activities in a State Having an Approved Permit Program and to Place Permit Issuance Fully in the Hands of the State
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Both the House and Senate reports on the 1972 Amendments indicate plainly that Congress intended full and complete transfer of permit issuing authority to a State upon approval of that State's permit program. The House Report, for example, states simply that:

"Subsection (c)(1) provides that not later than 90 days after the date on which a State has submitted a program pursuant to subsection (b), the Administrator shall suspend the Federal permit program authorized under subsection (a) unless he finds the proposed State permit program does not satisfy the requirements of subsection (b) or the guidelines issued under 304(b)(2)." Env. Policy Div., Cong. Research Svc., Library of Congress, 93d Cong., 1st Sess. 1 "A Legislative History of the Federal Water Pollution Control Act Amendments of 1972" ("Leg. Hist.") at 814.

Similarly, the Senate Report provides only that:

"after a State submits a program which meets the criteria established by the Administrator pursuant to regulations, the Administrator shall suspend his activity in such State under the Federal permit program." 2 Leg. Hist. at 1489.*

The House Report equates the term "Federal permit program" with Section 402(c)(1)'s phrase "issuance of permits". Similarly, the Senate Report equates EPA "activity ...under the Federal permit program" with the §402(c)(1) phrase "issuance of permits". The House Report states categorically that EPA must "suspend the Federal permit program" under §402(a) when a State permit program becomes effective. Likewise, the Senate Report requires the EPA Administrator to "suspend his activity in such State under the Federal permit program."

* See also remarks of Representative Roe, 1 Leg. Hist. at 428 ("Not later than 90 days after receiving the submittal the State would take over the program unless the Administrator found it did not satisfy the requirement.") and Leg. Hist. at 579 ("After the guidelines are issued, if the State submits an acceptable program, the Administrator would approve it and the State would take over administration of the permit program in that State."). OGC 63 at 4-5, n. 3 (JA 38-39). OGC 63 refers to precisely these excerpts, and admits:

"I am not unmindful of various statements in the legislative history of the FWPCA indicating that Congress did not intend for the Administrator to delegate to the States 'bits, pieces, categories or other parts' of a permit program. 2 Leg. Hist. at 261." OGC 63 at 10-11 (JA 44-45).

Yet the result reached by the EPA General Counsel conflicts irreconcilably with the admitted Congressional intent, because the consequence of OGC 63 is for EPA to allow the state only those fragments of the permit program EPA deigns to surrender.

These passages demonstrate that Congress meant the term "suspend the issuance of permits" to require EPA to cease its permit program activities upon the effectiveness of a state program.

This legislative history, all of which was cited in OGC 63, cannot be reconciled with the General Counsel's conclusion that EPA retains jurisdiction to issue permits after a state receives permit issuing authority. The legislative history shows that Congress meant the states to take over the permit program fully upon submission of a permit program meeting the requirements of the Act. Congress intended §402(c) to be read and applied in accord with the clear, express language of the section, so as to give the States complete permit programs and to hold back EPA's "federal activity."

Moreover, legislative history not cited by the EPA General Counsel, but brought to his attention in Utilities' briefs filed with him in April 1977, confirms that OGC 63 is wrong. In the floor debates on the Senate bill which became the Act, Senator Muskie, the Floor Manager of the Bill, stated, with regard to the transfer of permit issuing authority to the States:

"What [the Senate bill] does is continue the Federal Government's authority with respect to major polluters ...until such time as the States can develop permanent

authority of their own. At that time it is the expectation of this bill and of this administration to have the States assume that permanent authority and to administer the law directly." 2 Leg. Hist. 1366 (remarks of Sen. Muskie) (Emphasis added).

In addition to the remarks quoted above and cited in OGC 63, Representative Roe also stated in the debates on the House Bill:

"The procedure does not permit delay on the part of EPA. It must act [to approve a State program for granting NPDES permits] within a prescribed time period...The procedures established in the bill specifically do not permit the Administrator of EPA to delay." 1 Leg. Hist. 428 (remarks of Representative Roe).

Although the Federal Water Pollution Control Act has been termed "poorly drafted and astonishingly imprecise,"* there is nothing vague or imprecise about Congress' intentions relating to the transfer of permit-issuing authority. The legislative history emphasizes repeatedly and the Act states explicitly that EPA must transfer permit-issuing authority to a state as soon as it approves that state's permit program. No retention of permit-issuing authority is either contemplated or allowed by the Act.

* E. I. duPont de Nemours and Co. v. Train, 541 F.2d 1018, 1026 (4th Cir. 1976).

D. OGC 63's Conclusion that Permits Are "Issued"
Before a Public Hearing Is Held Conflicts with
the Act and the Legislative History

In OGC 63 EPA's General Counsel concluded that "issuance of permits under Subsection (a)" of §402 takes place on "the date on which the Regional Administrator issues his determination pursuant to 40 C.F.R. §125.35". OGC 63 at 7; (JA 41). However, the determination "pursuant to 40 C.F.R. 125.35" is only an initial proposal and is made prior to any opportunity for adjudicatory hearing.* EPA's General Counsel rejected the concept that issuance of permits is not complete until final agency action has taken place. OGC 63 at 11; (JA 45). OGC 63 ignores the plain meaning of the term "suspend the issuance of permits under subsection (a) of [§402]" and focuses instead upon an obtuse and highly technical construction of the word "issuance" in §402(c)(1).

Under §402(a) of the Act, EPA, may only "issue" permits "after opportunity for public hearing." Therefore, in

* Under EPA's regulations, the Regional Administrator's "determination" must take place prior to the adjudicatory hearing provided in EPA's regulations, since adjudicatory hearings can only be requested "[w]ithin 10 days following the date of determination with regard to a permit pursuant to [40 C.F.R.] §125.35(a)." 40 C.F.R. §125.36(b) (1) (1976).

concluding that EPA "issues" permits for purposes of §402(c)(1) prior to public hearings, EPA's General Counsel is arguing that the term "issue" must be read differently in §402(c)(1) than in §402(a)(1). That argument strains credulity.* In fact, §402(c)(1) states that EPA is required to "suspend the issuance of permits under subsection (a) of [§402]." There could hardly be a more explicit indication that the word issuance in §402(c)(1) refers to the identical permit issuing process as does the word "issue" in subsection (a) of §402. Section 402(a)(1) demonstrates that the process of issuing a permit cannot be complete until after the public hearing.

In OGC 63 EPA's General Counsel argued that the lack of the word "final" in §402(c)(1) implies that Congress meant that "issuance" as used in §402(c)(1) takes place before "final" administrative action on the permits. OGC 63 at 6; (JA 40). OGC 63 thereby assumes that permits may be issued before

* Compare Dobbs v. Costle, 559 F.2d 946, 948 n. 5 (5th Cir. 1977) where the Court said:

"The true criterion is the intention of the lawmaker as expressed in the words used under the particular circumstances of the enactment. There is no better technique than the 'three-fold imperative' prescribed by Justice Frankfurter: '(1) Read the statute; (2) read the statute; (3) read the statute!' Henry J. Friendly, Benchmarks (1967) 202."

"final administrative disposition". This assumption is conceptually wrong. A permit, any permit, is issued at, or after, the final agency action on it, not before. Indeed, the purpose of the word "final" in §402(k), which OGC uses to support this theory,* is to distinguish between issued permits and those which are not issued because their administrative disposition is not completed (i.e., not final). Moreover, the §402(c)(1) phrase "suspend the issuance of permits under subsection (a)", refers to subsection (a) and not to subsection (k) of §402.

Even more unconvincing is the General Counsel's reliance upon, and interpretation of, the Act's legislative history.** The overwhelming legislative history convincingly demonstrates Congress' intent that EPA's permit program be suspended and that states be allowed to exercise their primary responsibilities through administration of their own permit programs. EPA's General Counsel has concocted policy arguments

* §402(k) is set forth in the Appendix to this brief. See p. 72 infra.

** Moreover, it should be noted that EPA's General Counsel's reliance upon legislative history is inappropriate, since resort to legislative history is not warranted if the statute, here §402(c)(1), is clear and unambiguous. See Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974) and State Water Control Board v. Train, 559 F.2d 921, 924-5, n. 20 (4th Cir. 1977).

which frustrate this Congressional intent.* The EPA General Counsel's interpretation of the legislative history is contrary to the clear intent of Congress.

It is not an administrative agency's "prerogative to disagree with Congressional policy and refuse to implement it." Ross v. Community Services, Inc., 396 F. Supp. 278, order entered, 405 F. Supp. 831 (D. Md. 1975), aff'd, 544 F.2d 514 (4th Cir. 1976):

"An administrative agency is required to effectuate, not ignore, Congressional intent, whether the agency agrees with Congress or not. The judicial branch has the function of requiring the executive (or administrative) branch to comply with requirements set up by the legislative branch. National Automatic Laundry & Cleaning Council v. Shultz, 143 U.S. App. D.C. 274, 443 F.2d 689, 695 (1971)." 396 F.Supp at 286.

In Slough v. Commissioner of Internal Revenue, 147 F.2d 836, 839 (6th Cir. 1945), the Court stated the recognized principle that "interpretive regulations must be in furtherance of the intention of Congress, as evidenced by its Act...." This rule was stated another way by the Fourth Circuit in Walling v. Baltimore Steam Packet Co., 144 F.2d 130 (4th Cir. 1944).

There, the court wrote:

* As the Fifth Circuit characterized such arguments: "Defendant's [EPA's] arguments have little persuasiveness as a matter of law, but really raise questions of policy, expediency and convenience." Dobbs v. Costle, 559 F.2d 946, 949 (5th Cir. 1977). EPA may not use such arguments to frustrate the express intent of the Clean Water Act. N.R.D.C. v. Costle, 10 E.R.C. 2025 (D.C. Cir. Nov. 16, 1977).

"[I]t is...well settled that where the provisions of an act are plain and unambiguous, the department administering it has no power to extend or amend it by regulations or interpretation." Id. at 135.

Clearly, the relevant parts of §402 of the Act are unambiguous in their meaning.

Moreover, as was stated in National Life and Accident Ins. Co. v. United States, 524 F.2d 559 (6th Cir. 1975), a case where an Internal Revenue Service interpretation of a tax statute provision was challenged:

"The Courts and the Commissioner do not have the power to repeal or amend the enactments of the legislature even though they may disagree with the result; rather it is their function to give the natural and plain meaning effect to statutes as passed by Congress." Id. at 560.

EPA cannot, in OGC 63, amend an Act of Congress. The Agency must follow the "plain and natural meaning" of the Act. EPA's refusal to suspend issuance of Utilities' permits is not authorized by any provision of the Act. See Marsano v. Laird, 412 F.2d 65 (2d Cir. 1969).

OGC 63 refers to legislative history in support of the EPA General Counsel's conclusions that Congress expressed an intent for

"an orderly transfer of permit issuing authority ... [to] the States under the FWPCA, and for a permit program which would avoid duplication, be expeditious, and permit orderly enforcement and judicial review..." OGC 63 at 6; (JA 40).

No doubt Congress expressed interest on these matters. In fact, Congress expressly provided for these concerns in §402(c)(1), which directs EPA to "suspend the issuance of permits under subsection (a) of [§402]". Orderly transfer is accomplished and duplication is avoided under §402(c) because EPA is required to "suspend" its issuance of permits. Once the state permit program is operative, EPA is out of the business in that state. It is only EPA's present attempt to retain authority it no longer has which causes duplication and delay.*

OGC 63's conclusion wipes out Congress' clear policy of assuring the primacy of state activities through their own permit programs. As the Second Circuit noted in Mianus River Preservation Comm., supra:

* OGC 63 raises a spectre of "split permits" (i.e., issued in part by EPA and in part by a state) which, it is claimed, would disturb judicial review. OGC 63 at 8 (JA 42). These policy-related claims are incorrect. Once a state takes over the permit program, judicial review is under state law. Moreover, there is nothing novel in bifurcated judicial review of federal/state actions under environmental statutes. For example, under the Clean Air Act (42 U.S.C. §§1857-18571, federal action in regard to a State Implementation Plan is reviewable in federal court, while state action related to the plan is reviewable in state court. Hagedorn v. Union Carbide Corp., 363 F. Supp. 1061 (N.D. W.Va. 1973). As the court stated in League to Save Lake Tahoe, Inc. v. Sunday, 427 F. Supp. 1350, 1357 (D. Nev. 1977): "...the statute plainly shows that Congress intended to defer to state administrative action..." The wisdom of this structure has been determined by Congress, and it is not for EPA to attempt to reverse Congress' decision.

"According to the initial comments of the Senate Committee on Public Works, which favorably reported out original Senate Bill No. 2770:

The legislation will restore Federal-State balance to the permit system. Talents and capacities of those States whose own programs are superior are to be called upon to administer the permit system within their boundaries. The Administrator is to suspend his activity, insofar as the permit system is concerned, in these States." 541 F.2d 899, 905 (2d Cir. 1976) (Emphasis added).

E. Conclusion

In short, the policy judgments respecting transfer of permit authority to the states have already been made by Congress and expressed in §402(c)(1). Section 402(c)(1) directs EPA to stop issuing permits upon the effectiveness of a state permit program. OGC 63 concludes that EPA has discretion to disobey the express dictates of the Act and flout Congress' clear intent. However, EPA is bound to follow the Act. Congress directed that EPA suspend its permit program fully, and not dribble down to the states merely "bits, pieces, categories or other parts of a permit program." This intent cannot be circumvented, and EPA has no discretion to retain any authority to issue permits in New York State.

POINT II

THIS COURT, ON APPEAL FROM THE DISTRICT COURT, SHOULD DECLARE THAT EPA LACKS JURISDICTION TO CONTINUE ISSUANCE OF PERMITS TO UTILITIES, AND SHOULD DIRECT EPA TO SUSPEND THE ISSUANCE OF SUCH PERMITS

The District Court dismissed the complaint, holding, erroneously, that exclusive jurisdiction over the subject

matter lies in the Court of Appeals under §509(b)(1)(F) of the Act. The District Court characterized Utilities' complaint as interlocutory in nature and reasoned that such interlocutory relief must also be sought only in the Court of Appeals. In so holding, the District Court confused subject matter jurisdiction with the doctrine of finality.

However, section 509(b)(1) does not apply, because the permits in question have not been "issued", and therefore there is no basis for direct review in the Court of Appeals at this time. Lacking ability to obtain direct Court of Appeals review, Utilities applied to the District Court for relief under its "federal question" jurisdiction (JA 16), and further showed that it was not necessary to "exhaust administrative remedies" before EPA because Utilities are being irreparably injured (Pepsico v. FTC, 472 F.2d 179 (2d Cir., 197). Now that this controversy is before this Court on appeal, this Court has jurisdiction, by virtue of the appeal, to decide the substance of the controversy.

A. Section 509(b)(1) Does Not
Apply to this Case

The judicial review provisions of §509 of the Act are inapplicable to the present case. Section 509(b) provides:

"Review of the Administrator's action (A) in promulgating any standard of performance under

section 306, (B) in making any determination pursuant to section 306(b)(1)(c), (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 307, (D) in making any determination as to a State permit program submitted under section 402(b), (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306, and (F) in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day."

Section 509 is applicable only to the five enumerated specific categories of EPA action. Sun Enterprises, Ltd. v. Train, 532 F.2d 280 (2d Cir. 1976); Save The Bay, Inc. v. Administrator, EPA, supra. Utilities do not seek review under any of those categories. On the other hand, EPA argued below that exclusive jurisdiction over the subject matter lies in this Court by reason of categories (F) and/or (D) of §509(b)(1). The District Court held that 509(b)(1)(F) vests exclusive jurisdiction in the Court of Appeals and, therefore, dismissed the action.

1. Section 509(b)(1)(F) is Not Applicable
Because No Permit Has Yet Been Issued

Section 509(b)(1)(F) provides for Court of Appeals "[r]eview of the Administrator's action...in issuing or denying

any permit under section 402...[and] [a]ny such application shall be made within 90 days of such...issuance or denial...."

The plain words of the statute are that an application for review can only be made "after" issuance of the permits. The permits have not been "issued" (pp. 27-28, supra). Therefore §509(b)(1)(F) is inapplicable.

The District Court finessed the question whether the permits have or have not been "issued" (See opinion below, fn. 1 (JA 613)), and thus failed to grasp the key to this case.

EPA's position below was that:

"Final Agency action for the purpose of judicial review is not deemed to occur until the Administrator either denies review [of the initial decision by the Regional Administrator] or issues his decision. 40 CFR §125.36(n)(6)." EPA Memo of Law to the District Court at 25.

However, no review or denial of review by the EPA Administrator has yet occurred, and could not occur until after hearings and lengthy intermediate steps are completed. Thus, the subject matter of this action cannot now lie within §509(b)(1)(F) because the Administrator has not yet taken any action "in issuing or denying" Utilities' permits. The District Court's--and EPA's--position seems to be that Utilities have no right to judicial review of the legal question posed by the complaint until after the lengthy administrative hearings are over, and a decision reached in 1980 or 1981. This interpretation of the Act would deny Utilities any right to be heard

on the point that EPA is proceeding unlawfully until Utilities suffer the very injury which they seek to avoid.

If this interpretation of the Act is upheld, EPA would thereby immunize itself from Court review for the entire time a permit is in EPA's administrative issuing processes, even though that process is unlawful and injuring Utilities. Such an interpretation leaves Utilities without a remedy. Congress did not intend any such result. See State of Washington v. EPA, supra.

2. Section 509(b)(1)(D) is Not Applicable
Because Utilities Do Not Challenge a
"Determination as to a State Permit
Program"

Section 509(b)(1)(D) provides for Court of Appeals review of "the Administrator's action...in making any determination as to a State permit program submitted under Section 402(b)...." However, §509(b)(1)(D) is not applicable to this case because Utilities do not seek review of the October, 1975 determination of the EPA Administrator approving New York's permit program submitted under §402(b). Utilities do not contest that determination. The essence of Utilities' claim is that EPA has failed, under §402(c)(1) of the Act, to "suspend the issuance of permits".

EPA's duty under §402(c)(1) to "suspend the issuance of permits" is independent of EPA's determination approving the

New York permit program. It arises even in the absence of a formal EPA determination respecting a state permit program. By the terms of §402(c)(1), EPA's duty to cease its own issuance of permits becomes binding

"[n]ot later than ninety days after the date on which a State has submitted a permit program (or revision thereof)...unless [the EPA Administrator] determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2)...." Section 402(c)(1).*

When EPA determined in 1975 that New York's permit program met the statutory conditions for permit program approval, EPA's duty under §402(c)(1) to "suspend the issuance of permits" became binding upon the agency at that time. It is EPA's continuing failure to meet this affirmative duty in respect of Utilities' permits which Utilities seek to remedy

* Exhibit 2 to the Scolnik Affidavit (JA 349) indicates that New York had submitted "a full and complete request for State Program Approval" prior to May 5, 1975. As further stated in EPA's May 5, 1975 Public Notice (Exhibit 2 to Scolnik Affidavit): "The [EPA] Administrator is required to approve each such submitted program unless the program does not meet the requirements of section 402(b) and EPA's Guidelines." (JA 349) (Emphasis added). Since New York's permit program was approved by EPA, EPA must concede that New York's program meets the requirements of §402(b). See Scolnik Affidavit, Exhibit 5 (JA 354). The fact that EPA "is required" to approve state programs meeting the Act's requirements demonstrates that EPA's discretion in this area is nil, and certainly does not empower EPA to violate the express requirements of §402(c)(1). (Accord: Mianus River Preservation Comm.v. Administrator, EPA, supra.)

in this action, not any "determination" of the EPA Administrator regarding the New York permit program.

In Utah Power & Light Co. v. EPA, 553 F.2d 215 (D.C. Cir. 1977), the D.C. Circuit held that §307(b)(1) of the Clean Air Act, the jurisdictional analogue to §509(b)(1) of the Water Act, did not authorize original circuit court review of challenges to "a particular interpretation or application" of a statute or regulation. As Judge Leventhal wrote:

"Both the language ...and the policy considerations underlying that provision compel the conclusion that challenges to the validity of certain agency regulations are directly reviewable by courts of appeals, whereas challenges to interpretations of those regulations are not." Id. at 218 (emphasis added).

According to the D.C. Circuit, the fact that the claim did not on its face attack any of the particular EPA actions specified in the jurisdictional grant to the Courts of Appeals was a major factor militating against finding original jurisdiction in the circuit courts. Judge Leventhal also noted that

"it appears that UP&L could bring suit in federal district court under 28 U.S.C. §1331(a), as amended by Act of October 21, 1976, Pub. L. No. 94-574, §703, 90 Stat. 2721, which removed the amount in controversy requirement in civil actions against the United States or agencies thereof. Serious questions of due process would arise if [UP&L did not have] a jurisdictional predicate in district court." Id. at 219, n. 20.

Similarly, the Second Circuit, in Bethlehem Steel Corp. v. EPA, 538 F.2d 513 (2d Cir. 1976) held that it lacked jurisdiction over a petition for review

"because section 509(b)(1) of the FWPCA...which provides for review of certain actions of EPA, does not mention the [action for which review was sought] as one of the EPA actions that may be reviewed by courts of appeals." Id., at 514 (emphasis added).

3. The Memorandum of Agreement is Irrelevant

EPA argues that the "Memorandum of Agreement" it executed with NYDEC (JA 357) empowers the EPA to amend Congress' directives in §402(c) of the Act. This argument is contrary to both the express provisions of §402(c) and the established principle that jurisdiction may not be created by agreement. Certainly federal agencies lack authority to amend the law, by agreement or otherwise. EPA's "Memorandum of Agreement" may not be interpreted "in a manner contrary to the statute which [EPA] is charged with administering, nor in a manner which would give full effect to the intent of Congress." Board of Directors & Officers, Forbes Federal Credit Union v. National Credit Union Administration, 477 F.2d 777, 784 (10th Cir. 1973), cert. denied, 414 U.S. 924 (1973). Just as EPA cannot, in OGC 63, ignore the plain meaning of the Act (see pp. 31 to 38, supra), so it cannot ignore or amend §402(c) in its "Memorandum of Agreement." Since §402(c) is "plain and unambiguous," EPA "has no power to extend or amend it by regulations or interpretation." Walling v. Baltimore Steam Packet Co., supra, 135.

EPA claims that administrative expediency justifies its refusal to comply with the Act. But what EPA claims is

necessary in New York has not, as far as we are aware, been found necessary in any other state; and administrative expediency cannot justify ignoring the clear meaning of the Act. N.R.D.C. v. Costle, supra.

The Scolnik affidavit (¶39) (JA 337) claims that EPA has invested "inestimable man hours, since 1975 and continuing to this day" associated with Utilities' permit proceedings. EPA argues that this time investment would be lost if proceedings were transferred to NYDEC. However, there is no reason why EPA's preparatory effort need be wasted if proceedings were transferred to NYDEC. Moreover, to the extent that EPA is claiming that "administrative infeasibility" justifies its deviation from the plain directions of the Act, that claim has already been considered and decisively rejected. N.R.D.C. v. Costle, 10 E.R.C. 2025 (D.C. Cir. Nov. 16, 1977). Even the "Memorandum of Agreement" contemplates that EPA's role will be that of "defending" its proposed permits together with "such participation by the Commissioner [of NYDEC] as may be appropriate to each specific case in dispute". Scolnik affidavit, Exhibit 6, Article I, Paragraph 3, (JA 359). In proceedings before NYDEC, EPA would be free to become a party and to continue its role of "defending" its proposed permits as a party to hearings before NYDEC. (See Bergen Affidavit, JA 578). The appropriate participation by NYDEC would be as the finder of fact and administrative decision maker. Thus no

conflict with the "Memorandum of Agreement" arises from transfer of Utilities' permit proceedings to NYDEC.

B. The District Court had Jurisdiction Over
the Action Filed Below, and to Grant
the Relief Requested

The court below erroneously concluded that exclusive jurisdiction over Utilities' action lies in the Court of Appeals. However, 28 U.S.C. §1331 clearly establishes that the District Court had jurisdiction; and because the controversy is substantial and immediate, the District Court should have granted the relief sought by Utilities.

1. The District Court had "Federal
Question" Jurisdiction

The 1976 amendments to the Judicial Code and the Administrative Procedure Act make clear that subject matter jurisdiction over this action resides in the District Court. As the U.S. Supreme Court stated in Califano v. Sanders, 430 U.S. 99 (1977):

"On October 21, 1976, Congress enacted Pub. L. 94-574, 90 Stat. 2721, which amends 28 U.S.C. §1331(a) to eliminate the requirement of a specified amount in controversy as a prerequisite to the maintenance of 'any [§1331] action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.' The obvious effect of this modification, subject only to preclusion-of-review statutes created or retained by Congress, is to confer jurisdiction on federal courts to review agency action, regardless of whether the APA of its own force may serve as a jurisdictional predicate." Id., at 105 (Emphasis added).

Section 505 of the Act, which provides for citizens' suits, preserves Utilities' rights "under any statute...to seek...relief (including relief against the Administrator or a State agency)." Contrary to EPA's suggestion that agency actions which someday might be subject to direct review by a Court of Appeals under §509(b)(1) must always be held in abeyance until they "ripen", §505(e)* demonstrates that District Courts have jurisdiction over improper agency action prior to maturation into one of the specific categories of actions over which the Courts of Appeal have jurisdiction pursuant to §509(b)(1). See Natural Resources Defense Council v. Callaway, 524 F.2d 79 (2d Cir. 1975). EPA's assertion also ignores the irreparable injury Utilities would suffer (if relief is not granted now) due to the long time needed to complete EPA hearings, then seek judicial review in the Court of Appeals, rehear the issue before NYDEC, and complete construction of any necessary facilities before the statutory compliance deadline.

* Section 505(e) states:

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

2. The District Court Had Authority to Issue
a Judgment Declaring that EPA Does Not Now
Have Jurisdiction to Continue Issuance of
Permits to Utilities

Declaratory judgments are authorized by 28 U.S.C. §§2201 and 2202 and the requirement in 28 U.S.C. §2201 for an "actual controversy" is fulfilled in this case because, in the words of the Supreme Court:

"...the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Co. v. Pacific Coal and Oil Co., 312 U.S. 270, 273 (1941).

See Aetna Life Insurance Co. of Hartford, Conn. v. Haworth, 300 U.S. 227 (1937); Public Service Comm'n v. Wycoff Co., 344 U.S. 237 (1952); and 10 Wright & Miller, Federal Practice and Procedure: Civil §2757.

The controversy is substantial and immediate. By July 1, 1984, Utilities must be in compliance with permit conditions established under the Act. The permits now proposed would require cooling towers having a capital cost in excess of \$350 million. The construction of cooling tower facilities involves long lead-times. Flick Affidavit, ¶42 (JA 84). Thus, it is vital to resolve the jurisdictional question now so that Utilities may be heard by the proper forum on their objections to the cooling tower proposals as quickly as possible, and so that a final determination on the Act's requirements is made sufficiently early to enable Utilities to meet the 1984 deadline.

Utilities are entitled to hearings on their objections to EPA's proposed permits before contested permit conditions can be issued under §402 of the Act. Yet, unless jurisdiction is transferred now Utilities inevitably face the necessity for a "second round" of hearings before NYDEC, which, since October 1975, has been the only agency with jurisdiction over "issuance" of Utilities' permits.

The Courts have taken the position that EPA lacks authority to extend the compliance dates set forth in the Act, having construed the Act's July 1, 1977 compliance date* as "a rigid guide post" beyond which an applicant may not operate its facilities unless in compliance with a permit issued under the Act. Bethlehem Steel Corp. v. Train, supra (technical impossibility not a ground for extension of 1977 deadline in §301(b)(1)); U.S. Steel v. Train, supra; State Water Control Board v. Train, supra (economic impossibility not a ground for extension of 1977 deadline for municipal sewage operators).

* §301(b) of the Act created a two step procedure for controlling discharges from existing point sources. The first stage required installation of "best practicable technology" by July 1, 1977 (§301(b)(1)) and the second, more stringent, stage required installation of "best available technology economically achievable" by July 1, 1983 (§301(b)(2)). The 1983 deadline was delayed by one year by the Clean Water Act. See p. 18, supra.

Two things must take place before the July 1, 1984 deadline: one, Utilities must be afforded a hearing before the agency having jurisdiction and, two, Utilities must have adequate time to construct any needed facilities before July 1984. Construction of cooling towers at all four power plants could require as much as five years. Block Affidavit ¶42 (JA 84). If compelled to complete EPA hearings, Utilities would be faced with choosing among waiving their rights to hearing by voluntarily undertaking construction of some facilities, or risking enforcement after July 1, 1984, or simply shutting down one or more of their power plants.

Given the time which would be required to comply with the permits as proposed, EPA's insistence upon consuming the bulk of the available time with hearings which EPA lacks jurisdiction to conduct is a matter which irreparably injures Utilities.

C. Utilities are Not Required to Exhaust
Administrative Remedies Before an
Agency Which Lacks Jurisdiction

The relief sought (declaratory judgment and prohibitory order) was within the District Court's authority. Given the immediate and substantial injury to Utilities if the fundamental legal question of EPA's jurisdiction to conduct hearings is not resolved now, Utilities urge this Court to

exercise that authority and issue the requested declaratory judgment and prohibitory order. No useful purpose could be served by withholding judicial review until after the EPA hearings are complete.*

The purpose of the exhaustion doctrine, the Supreme Court has observed:

"is to allow an administrative agency to perform functions within its special competence--to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." Parish v. Davidson, 405 U.S. 34, 37 (1972).

None of those values can be effectuated by withholding the relief requested in this case. While there nominally are agency proceedings pending, in reality those proceedings are a nullity because the agency lacks "subject matter jurisdiction" to conduct the hearings. In fact, there are no legitimate agency remedies open to Utilities before EPA. No factual record is necessary for this Court to determine that EPA lacks jurisdiction. EPA's General Counsel has rejected

* The proposition that judicial review of agency action can, and in this case should, take place prior to exhaustion of administrative remedies is hardly novel. See, for example, the many cases listed by Judge Wright in "a highly abridged listing of cases in which federal courts have reached the merits or stayed administrative proceedings despite the existence of unexhausted administrative remedies..." Bannercraft Clothing Co. v. Renegotiation Board, 466 F.2d 345, 354 n. 7 (D.C. Cir. 1972).

Utilities' position that EPA lacks jurisdiction. Thus, EPA's "expertise" has already been applied to the issue and, in that application, EPA was afforded the opportunity to correct its own errors.

Utilities cannot afford the time required to participate in the charade of EPA hearings due to the imminence of the 1984 deadline. Even absent the statutory deadline, EPA hearings are an exercise in futility due to EPA's lack of subject matter jurisdiction. Utilities are not bound to go "through the ritualistic exercise of asking the [Agency] to admit guilt which it strenuously denies." Writers Guild of America, West, Inc. v. F.C.C., 423 F. Supp. 1064, 1081 (N.D. Calif. 1976). Exhaustion of administrative remedies before EPA is futile, and in these circumstances is not required.

The Court's intervention now in the administrative process, to the limited extent sought by Utilities, is necessary to correct agency action clearly in violation of law.

In Shell Oil Co. v. Federal Energy Administration, 400 F. Supp. 964 (S.D. Texas 1975), aff'd, 527 F.2d 1243 (Em. App. 1975) the Court dealt with a case which, like this one, was "before the court on a very narrow issue of law..." Id. at

968. The Court granted plaintiffs' motion for summary judgment and held:

"Recently, the Temporary Emergency Court of Appeals held in Consumers Union of United States, Inc. v. Cost of Living Council, 491 F.2d 1396 (Em. App. 1974), that exhaustion of remedies is not required if the question involved is purely legal, requiring no administrative fact finding to properly frame the issues in dispute, or the Agency's expertise in determining technical factual disputes is not necessary because the question is purely legal, or the purported illegality of the regulations are known to the Agency and they have declined to remedy the alleged illegality. All three of these exceptions are present in the instant case. The court holds that in the circumstances of this case there is no further necessity for [plaintiff] to seek agency action before coming into this court of law." Id.

See also Comprehensive Group Health Services Board of Directors v. Temple Univ., 363 F.Supp. 1069 (E.D. Pa. 1973) wherein the Court recognized:

"Courts will not insist on exhaustion when the particular issue involved is a constitutional and/or legal one and is not addressed to a particular area of administrative expertise." Id. at 1098.

As the Seventh Circuit stated in allowing judicial review of an F.T.C. matter prior to exhaustion where, as here, the issue involved a question of law:

"The legal obligation of [an agency] can be determined by the courts without delay and we think the proper approach is to allow such inherently legal attacks prior to an agency's final order." Jewel Companies, Inc. v. F.T.C., 432 F.2d 1155, 1159 (7th Cir. 1970).

The Supreme Court has held that the term "final" in the Administrative Procedure Act (5 U.S.C. §704) must be construed in a pragmatic fashion. Abbot Laboratories v. Gardner, 387 U.S. 136, 149-151 (1967). By this standard the issuance of OGC 63, holding (erroneously) that EPA has jurisdiction over the permits even though the entire program in New York was transferred to New York State, is a pragmatically "final" EPA action. This agency action is "final" because it would compel Utilities to proceed through hearings and then through agency review procedures before they could raise their objections to EPA's lack of subject matter jurisdiction. However, by operation of EPA regulations (40 C.F.R. §§125.36(m) and (n)), OGC 63 cannot be reviewed until after the hearings are complete and the initial decision by the Regional Administrator reviewed by the EPA Administrator in Washington. By that time, it will be too late. Judicial review at this time is necessary to provide a remedy,* to which Utilities are clearly entitled. See State of Washington v. EPA, supra.

* As Judge Leventhal stated:

"The issue of finality is...determined not by the name assigned by the agency to its action but 'in a pragmatic way.' The [Supreme] Court has found final action in a wide array of pronouncements and communications having the contemplation and likely consequence of 'expected conformity.'" National Automatic Laundry and Cleaning Council v. Schultz, 443 F.2d 689, 698 (D.C. Cir. 1971).

This case presents a legal issue relating to jurisdiction, a kind of legal question traditionally resolved by courts. Indeed, one of the first matters a court undertakes is inquiry into its jurisdiction to determine whether it has power to decide a case. Because a legal question of jurisdiction is one courts are particularly qualified to resolve, the doctrine of exhaustion of administrative remedies is especially inapplicable in this case:

"Where legal questions are presented which are of the type traditionally determined by courts and there is no question involving underlying administrative expertise no exhaustion of administrative remedy is required. In Public Utilities Comm. v. United Fuel Gas Co., 317 U.S. 456... (1943) the Court denied the applicability of the [exhaustion] doctrine, in a case attacking a state commission's orders as invalid, saying: 'No inquiry beyond the orders themselves and the undisputed facts which underlie them is necessary in order to discover that they are in conflict with the federal Act.'" Lee County School District No. 1 v. Gardner, 263 F. Supp. 26, 31-32 (D.S.C. 1967).

Lack of jurisdiction is a defect so fundamental that it may be raised, in court proceedings, at any time. The Supreme Court in Leedom v. Kyne, 358 U.S. 184 (1958) held that agency jurisdiction may be questioned in the courts during the pendency of proceedings before an agency. The Court in Leedom dealt with the jurisdiction of the National Labor Relations Board to conduct a hearing for which the Board did not have authority. The Court stated that the issue was:

"whether a Federal District Court has jurisdiction of an original suit to vacate [a] determination of the Board because made in excess of its powers." 358 U.S. 184, 185.

The Board argued that the district court lacked jurisdiction to hear the suit. The Supreme Court rejected the Board's argument and stated:

"This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." 358 U.S. 184, 190.

The principles established by the Supreme Court in Leedom* have been applied in the Second Circuit. In Pepsico v. F.T.C., supra, plaintiff Pepsico sought to restrain the Federal Trade Commission from conducting an investigation, on the grounds that it was beyond the FTC's jurisdiction. The FTC argued that Pepsico should be required to exhaust its administrative remedies because Pepsico would have a right to judicial review of the FTC's decision following conclusion of the agency proceeding. The Second Circuit rejected that argument and stated:

* Leedom was preceded by Skinner & Eddy Corp. v. U.S., 249 U.S. 557 (1919) in which Mr. Justice Brandeis held exhaustion not proper in a case in which: "The contention is that the commission has exceeded its statutory powers; and that, hence the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if plaintiff has not attempted to secure redress in a proceeding before the commission." 249 U.S. at 562.

"...one can find 'final agency action for which there is no other adequate remedy in a court' if an agency refuses to dismiss a proceeding that is plainly beyond its jurisdiction as a matter of law or is being conducted in a manner that cannot result in a valid order." 472 F.2d 179, 187.

The Court continued:

"The injury against which a court would protect is not merely the expense to the plaintiff of defending in the administrative proceeding, which Myers held not to be enough, 303 U.S. at 51-52, 58 S.Ct. 459, but, in a case like this, the enormous waste of governmental resources and the continuing threat of a complete restructuring of an industry. While Pepsico and its bottlers cannot be heard to complain of the Commission's attempt to accomplish this restructuring, arguably they should not be placed under that threat in a proceeding that must prove to be a nullity." 472 F.2d 179, 187 (Emphasis added); Cf. Sterling Drug v. Weinberger, 509 F.2d 1236 (2d Cir. 1975).

The principles set forth by the Seventh Circuit in Coca Cola Company v. F.T.C., 475 F.2d 299 (7th Cir. 1973) are in accord with the rule in this circuit:

"The most widely recognized exception to the general rule against judicial consideration of interlocutory agency rulings is the class of cases where an agency has exercised authority in excess of its jurisdiction or otherwise acted in a manner that is clearly at odds with the specific language of a statute. The leading case of this kind is Leedom v. Kyne, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed. 2d 210 (1958). In Kyne, the National Labor Relations Board had grouped professionals with non-professionals in the same bargaining unit without a vote of the professionals, in defiance of an express statutory prohibition. Since this 'was an attempted exercise of power that had been specifically withheld,' at 189, 79 S.Ct. at

184, it was properly enjoined by the District Court. The rule that only 'a plain contravention of a statutory mandate' justifies district court intervention before termination of election procedures in labor cases has been followed in this Circuit. Boire v. Miami Herald Publishing Co., 343 F.2d 17, 24 (1965), and an analogous rule has been applied to Federal Trade Commission proceedings. Federal Trade Commission v. J. Weingarten, Inc., 336 F.2d 687 (5th Cir. 1964). The rule that agency action 'contrary to a specific mandate of...[an] Act [of Congress]' Templeton, supra at 1069, is remediable judicially before administrative proceedings are at an end has been applied in the context of other agencies, notably in selective service cases, see, e.g., Oestereich v. Selective Service Board, 393 U.S. 233, 89 S.Ct. 414, 21 L.Ed. 2d 402 (1968); Breen v. Selective Service Board, 396 U.S. 460, 90 S.Ct. 661, 24 L.Ed. 2d 653 (1970)." 475 F.2d at 303.

A situation similar to this case (because the agency was acting far beyond its jurisdictional bounds) was presented in Writers Guild of America, West, Inc. v. F.C.C., supra. In discussing the inapplicability of the exhaustion doctrine, the District Court observed:

"even if the problems of bias and futility were not involved, exhaustion would not be required because that doctrine is inapplicable when an agency has taken an action beyond its jurisdiction and thereby imposed an immediate burden on the exercise of important rights. As Professor Davis observes, 'No court requires exhaustion when exhaustion will involve irreparable injury and when the agency is palpably without jurisdiction.' [Citations omitted.]

"This does not mean, of course, that orderly administrative procedures may be bypassed automatically merely because the plaintiff claims that a

particular administrative action is unconstitutional or otherwise in excess of its statutory powers. [Citations omitted.]

"The case law though marked by overgeneralization can be reconciled as Davis observes by the application of three factors: '[E]xtent of injury from pursuit of administrative remedy, degree of apparent clarity or doubt about administrative jurisdiction, and involvement of specialized administrative understanding in the question of jurisdiction.' 3 K. Davis, supra, §20.03 at 69. In fact, the Ninth Circuit Court of Appeals has specifically adopted Professor Davis' formulation commending it as one that 'is as complete and workable as can be stated.' Lone Star Cement Corp. v. FTC, 339 F.2d 505, 510 (1964)." 423 F. Supp. 1064, 1082-1083.

The Ninth Circuit recently reaffirmed the Lone Star case referred to above in State of California ex rel. Christensen v. F.T.C., 549 F.2d 1321 (9th Cir. 1977). Even by the stringent Ninth Circuit standards of Christensen, Utilities in this case are not required to exhaust their administrative remedies:

1. Irreparable Injury. Christensen indicates that:

"only a clear showing of irreparable injury from anticipated agency action will excuse the exhaustion of administrative remedies and permit judicial intervention in the agency process." 549 F.2d 1321, 1323.

Utilities have shown that they are irreparably injured.

This injury goes far beyond the expense and inconvenience of litigating before EPA.

2. The Defect in EPA Jurisdiction is Patent.

Christensen indicates that interlocutory challenges to agency jurisdiction are "limited...to jurisdictional defects which are

apparent on the face of the record." 549 F.2d, at 1324. The defect in EPA's jurisdiction here is clear.

3. No Agency "Expertise" is Involved. The third factor considered in the Ninth Circuit's test is "involvement of agency expertise on the question of jurisdiction." In Christensen, the Ninth Circuit dealt with a case in which "a full factual development is an essential prerequisite..." to determining the agency's jurisdiction. On the other hand, in the case now before this Court, the relevant facts are few, simple and already developed. There are no complicated facts which require agency expertise to analyze.

The doctrine of exhaustion does not shield agencies from judicial review of improper agency action during an on-going proceeding, especially when the only issue is a matter of law divorced from factual controversy. In McKart v. U.S., 395 U.S. 185 (1969), the government instituted a criminal prosecution against petitioner McKart for failing to report for a Selective Service pre-induction physical. Petitioner asserted as a defense that his classification by the Local Draft Board was improper as a matter of law. The Court recognized:

"The question of whether petitioner is entitled to exemption as a sole surviving son is, as we have seen, solely one of statutory interpretation. The resolution of that issue does not require any particular expertise on the part of the [agency]; the proper interpretation is certainly not a matter of discretion". 395 U.S. 185, 197-198.

D. The Court of Appeals, Should Now Decide
the Substance of the Controversy

This case is ripe for decision and Utilities face substantial irreparable harm if EPA continues illegally to assert jurisdiction over Utilities' permit applications. Regardless of whether this Court has jurisdiction under §509(b) of the Act, or 28 U.S.C. §1291, it should take this opportunity to reach and decide the merits of the controversy. The facts and issues are the same in both the appeal and review proceedings.

This Court should reverse the District Court. However, no useful purpose would be served by a remand. A Court of Appeals can decide a case on the merits when all substantive arguments have been presented below and when the Court is in as good a position as the Court below to decide the legal question involved. That is precisely the situation which exists here, since the parties cross-moved below for summary judgment. Judicial economy and the manifest harm which continued delay would cause Utilities impel the Court to reach a determination on the merits at this juncture. Accord: State of Washington v. EPA, supra.

It is well established that a Court of Appeals has the authority to grant a motion for summary judgment on the merits where a case is before it on an appeal from a procedural decision of the court below. In Smith v. Government of Virgin Islands, 329 F. 2d 135 (3d Cir. 1964), reh. denied, 379 U.S. 872 (1964), the Third Circuit was faced with appeals from a

dismissal by the District Court on the grounds that plaintiff failed to state a claim upon which relief could be granted. The Court of Appeals noted that the case was ripe for summary judgment below, and that the District Court had erred in its decision to dismiss. Rather than remand, however, the Third Circuit decided that:

"Since the record made below fairly presents the issue as to whether Government and Harvey are entitled to summary judgments judicial economy will patently be served by an immediate determination of this issue rather than remanding these cases to the District Court for disposition." 329 F. 2d at 142.

Similarly, in Tri-State Generation & Transmission Association, Inc. v. Public Service Commission of Wyoming, 412 F. 2d 115 (10th Cir. 1969), cert. denied, 397 U.S. 1043 (1970), the Court reversed the District Court's finding that the lower court lacked subject matter jurisdiction and disposed of the case itself because the further delay of remand would have caused irreparable harm to the plaintiff there.*

More recent decisions support the proposition that, if permitted by the record on appeal, it is appropriate for a Federal Court of Appeals to dispose of a case on its merits, rather than remand. Thus in Universal Athletic Sales Co. v.

* In that case, the irreparable harm was a function of a three year wait for the Court of Appeals' decision. In the instant case, the duration of actual litigation is somewhat shorter, but, as Utilities have shown above, delay in transferring the proceedings to NYDEC is injurious in this case.

Salkeld, 511 F. 2d 904 (3d Cir. 1975), cert. denied, 423 U.S. 863 (1975), a patent case, the Third Circuit determined that the record was clear on the issue at hand, and that it was unnecessary to remand because the Court of Appeals was therefore in "as good a position" as the District Court to determine the question. 511 F.2d at 907 and cases cited therein. A second Third Circuit decision reached the same conclusion in a contract case. William B. Tanner Co., Inc. v. WIOO, Inc., 528 F. 2d 262 (3d Cir. 1975).

On the other hand, if this Court was to find that it has exclusive subject matter jurisdiction under §509(b)(1), it would obviously be in a position to reach and decide the merits in the Petition for Review. It should then find that OGC 63 was a "determination as to a State permit program", under §509(b)(1)(D). The Court would have jurisdiction to reach the merits because the initial petition for review was filed within 90 days after OGC 63 was served upon the parties. Under this approach, OGC 63 itself would be a "determination as to a State permit program".

Alternatively, if this Court should decide that it has exclusive subject matter jurisdiction under §509(b)(1)(F) (but see State of Washington v. EPA, *supra*, at 2-7), it should now decide the merits of this controversy on the principle that §509(b)(1)'s requirement of administrative finality

should be waived under the facts presented. This principle would be the analog to the line of cases which waive the doctrine of exhaustion of administrative remedies discussed above. (supra, pp. 51 to 61) That is, the original jurisdiction of the Court of Appeals, like the "federal question jurisdiction" of the District Court, may be exercised prior to exhaustion of administrative remedies where the harm is immediate and irreparable, a question of law is presented, and the issue is whether the agency has, or does not have, jurisdiction to proceed.

E. The Action is Timely

Appellees-Respondents argued below that the Court should deny relief on the ground of laches. The argument flies in the face of the hornbook rule that laches do not bar an objection to a tribunal's subject matter jurisdiction. See, e.g., Mooney Aircraft, Inc. v. Donnelly, 402 F.2d 400, 406 (5th Cir. 1968); Stone v. E.D.S. Federal Corporation, 351 F. Supp. 340, 341 (N.D. Calif. 1972). In Stone v. E.D.S. Federal Corporation, the defendant moved to dismiss for lack of subject matter jurisdiction after numerous discovery proceedings had been held and after many orders of the court had been issued. The plaintiff protested that the motion was too late, but the court unconditionally stated that neither laches nor

delay can confer authority on a court which lacks jurisdiction. The principle is also implicit in Rule 12(h)(3), Fed. R. Civ. P. 12(h)(3), which provides that the lack of subject matter jurisdiction is cause for dismissal whenever and by whomever the issue is raised. See, generally, 2A Moore's Federal Practice ¶12.23, at 2456-63.

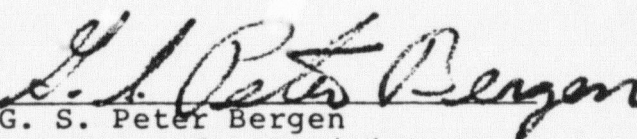
CONCLUSION

For the reasons stated above, given the purely legal question presented, and the pressing need for a final determination of the merits of this controversy, this Court should decide and order that EPA's jurisdiction to issue Utilities' NPDES permits terminated on October 29, 1975 and that jurisdiction to proceed with Utilities' permits lies in NYDEC.

Respectfully submitted

LeBOEUF, LAMB, LEIBY & MacRAE

by


G. S. Peter Bergen

Attorneys for Petitioners-
Appellants;
Central Hudson Gas and
Electric Corporation,
Consolidated Edison Company
of New York, Inc., Orange
and Rockland Utilities, Inc.,
Power Authority of the State
of New York

140 Broadway
New York, New York 10005

Of Counsel:

Robert J. Glasser
Thomas E. Mark

Dated: March 27, 1978

APPENDIX: RELEVANT STATUTES

Clear Water Act (Federal Water Pollution Control Act, as amended 1972, 1977) 33 U.S.C. §§1251 et seq. as amended by P.L. 95-217.*

DECLARATION OF GOALS AND POLICY

SEC. 101.

(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. *It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act.*

* New language added by P.L. 95-217 is shown in italics, deletions are enclosed by brackets.

TITLE III—STANDARDS AND ENFORCEMENT

EFFLUENT LIMITATIONS

SEC. 301. (a) Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

(b) In order to carry out the objective of this Act there shall be achieved—

(2) (A) *[not later than July 1, 1983] for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315), that such elimination is technologically and economically achievable for category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 307 of this Act; [and]*

(B) *not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 201(g)(2)(A) of this Act [.] ;*

(C) *not later than July 1, 1984, with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph;*

(D) *for all toxic pollutants listed under paragraph (1) of subsection (a) of section 307 of this Act which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitation in accordance with subparagraph (A) of this paragraph not later than three years after the date such limitations are established;*

(E) *not later than July 1, 1984, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 304(a)(4) of this Act shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(4) of this Act; and*

(F) *for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph not later than 3 years after the date such limitations are established, or not later than July 1, 1984, whichever is later, but in no case later than July 1, 1987.*

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

SEC. 402. (a) (1) Except as provided in sections 301 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(b) At any time after the promulgation of the guidelines required by subsection (h) (2) of section 304 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act, or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require *the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307(b) of this Act into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 301 if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and*

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 304(b), 307, and 308.

(c) (1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2) of this Act. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 304(h) (2) of this Act.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(d)(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b) (5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act. *Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.*

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) *In any case where, after the date of enactment of this paragraph, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this Act.*

(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505, with sections 301, 302, 306, 307, and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, or 402 of this Act, or (2) section 13 of the Act of March 3, 1899, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899, the discharge by such source shall not be a violation of this Act if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

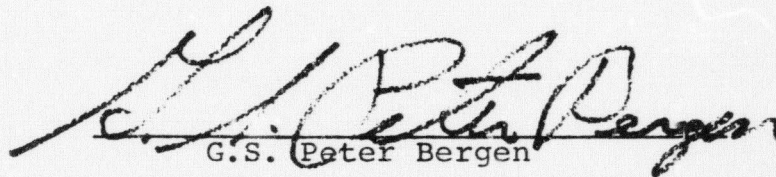
ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW

SEC. 509.

(b)(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 306, (B) in making any determination pursuant to section 306(b)(1)(C), (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 307, (D) in making any determination as to a State permit program submitted under section 402(b), (E) in approving or promulgating any effluent limitation or other limitation under sections 301, 302, or 306, and (F) in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served by hand upon each of the parties to this proceeding two copies of the foregoing Brief of Appellants-Petitioners.


G.S. Peter Bergen

Dated: March 28, 1978